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No. 86-870

In The
Supreme Court of the United States
October Term, 1986

PHILLIPS PETROLEUM COMPANY AND
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI, AND
SAGA PETROLEUM U.S., INC.,
Respondents.

On Writ of Certiorari
to the Supreme Court of Mississippi

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, FLORIDA, HAWAII, LOUISIANA, NORTH CAROLINA, OREGON, TEXAS, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, by expanding the common law defintion of navigability to apply to inland waters, non-tidal but navigable in fact, this Court deprived the states of rights heretofore existing in their tidal waters.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THE STATES ACQUIRED SOVEREIGN TITLE TO ALL LANDS UNDERLYING TIDEWATERS UPON THEIR ADMISSION INTO THE UNION	5
II. THE PROPERTY LAW OF THE STATES DEVELOPED IN RELIANCE ON THEIR CONTROL OF TIDAL WATERS. A CHANGE IN THE RULES OF LITTORAL OWNERSHIP WOULD CAUSE ENDLESS CONFUSION	15
III. THE STATES' TITLE TO TIDAL LANDS WAS CONFIRMED BY THE SUBMERGED LANDS ACT	19
IV. PUBLIC TRUST INTERESTS PROVIDING THE BASIS FOR SOVEREIGN OWNERSHIP APPLY TO ALL TIDAL WATERS	24
CONCLUSION	28

TABLE OF AUTHORITIES

Page

CASES

Adams v. Pease, 2 Conn. 481 (1818) 8

Appleby v. City of New York, 271 U.S. 364 (1926) 6

Application of Ashford, 50 Haw. 314, 440 P.2d 76 (1968) 22

Arnold v. Mundy, 6 N.J.L. (1 Hal.) 1 (1821) 24, 25

Barney v. Keokuk, 94 U.S. 324 (1876) 3, 8, 15, 17, 28

Berry v. Carle, 3 Me. (3 Green.) 269 (1825) 8

Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) 20

Borax Ltd. v. Los Angeles, 296 U.S. 10 (1935) 17

Borough of Neptune City v. Avon by the Sea, 61 N.J. 296, 294 A.2d 47 (1972) 25

Bullock v. Wilson, 2 Port. 436 (Ala. 1835) 7

California ex rel. *Lands Comm'n. v. U.S.*, 457 U.S. 273 (1982) 21

Caminiti v. Boyle, 107 Wash.2d 662, 732 F.2d 989 (1987) 14

Carson v. Blazer, 2 Binn. 475 (Pa. 1810) 7, 28

Cates v. Wadlington, 1 McCord 356 (S.C. 1822) 8

City of Long Beach v. Mansell, 3 Cal.3d 462, 476 P.2d 423, 91 Cal.Rptr. 23 (1970) 24

Cobb v. Davenport, 32 N.J.L. (3 Vroom) 369 (1879) 16

Collins v. Benbury, 25 N.C. (3 Ired.) 277 (1842) 8

Collins v. Benbury (II), 27 N.C. 118 (1884) 22

Commissioners of the Canal Fund v. Kempshall, 26 Wend. 404 (N.Y. 1841) 8

Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851) 22

Commonwealth v. Chapin, 22 Mass. (5 Pick.) 203 (1827) 8

TABLE OF AUTHORITIES—Continued

Pages

Elwood v. City of New York, 450 F.Supp. 846 (1978) 6

Gavitt v. Chambers, 3 Ohio 495 (1828) 8

Hardin v. Jordan, 140 U.S. 371 (1891) 10, 11, 19

Hayes v. Bowman, 22 Va. (1 Rand.) 417 (1823) 8

Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) 8, 23

Ingram v. Threadgill, 14 N.C. (3 Dev. 59 (1831) 8

Inhabitants of West Roxbury v. Stoddard, 89 Mass. (7 Allen) 158 (Mass. 1863) 25

Jackvony v. Powel, 67 R.I. 218, 21 A.2d 554 (1941) 15

Just v. Marinette County, 56 Wis.2d 7, 201 N.W. 2d 761 (1972) 25

Luttes v. State, 159 Texas 500, 324 S.W.2d 167 (Tex. 1958) 22

Mann v. Tacoma Land Co., 153 U.S. 273 (1894) 13

Marks v. Whitney, 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790 (1971) 25

Martin v. Waddell, 41 U.S. (16 Pet.) 409 (1842) 9, 22, 23, 24

Matthews v. Bay Head Improvement Assn., 95 N.J. 306, 471 A.2d 355 (1984), cert. den. 469 U.S. 821 22

McKeen v. Delancy's Lessee, 9 U.S. (5 Cranch) 22 (1809) 21

McManus v. Carmichael, 3 Iowa 1 (1856) 11

Middletown v. Pritchard, 4 Ill. (3 Scam.) 519 (1842) 8

TABLE OF AUTHORITIES—Continued

Pages

Monongahela Bridge Co. v. Kirk, 46 Penn. St. 112 (1863) 9

Morse v. Oregon Div. of State Lands, 34 Or. App. 853, 581 P.2d 520 (1978) 26

Murdock v. Stickney, 62 Mass. (8 Cushing) 113 (1851) 10

National Audubon Society v. Los Angeles Dept. of Water and Power, 33 Cal.3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), cert. den. 464 U.S. 977 (1983) 26

Oregon ex rel. *State Land Board v. Corvallis Land & Gravel Co.*, 429 U.S. 363 (1977) 1, 12, 15, 16, 22

Packer v. Bird, 71 Cal. 134, 11 P. 873 (1886) 12

Packer v. Bird, 137 U.S. 661 (1891) 9

People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913) 14, 17, 23

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) 4, 5, 7, 12

Robinson v. Silver Lake Ry. & Lumber Co., 153 Wash. 261 (1929) 14

Ross v. Burkhard Investment Co., 90 Cal.App. 201, 265 P. 982 (1928) 19

Scott v. Willson, 3 N.H. 321 (1825) 8

Shively v. Bowlby, 152 U.S. 1 (1893) ..... *passim*

Simmons v. French, 25 Conn. 346 (1856) 11

State v. Bradford, 50 S.W.2d 1065 (Tex. 1932) 23

Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) 21

The Propeller Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851) 7, 28

TABLE OF AUTHORITIES—Continued

Pages

United States v. California, 332 U.S. 19 (1947) 19

United States v. DeFelice, 641 F.2d 1169 (5th Cir. 1981) 18

United States v. Mission Rock Co., 189 U.S. 391 (1903) 1

United States v. 1.58 Acres of Land, 523 F.Supp. 120 (D. Mass. 1981) 27

U.S. v. Oregon, 295 U.S. 1 (1935) 4

Ward v. Mulford, 32 Cal. 365 (1867) 19

Weber v. Board of Harbor Commissioners, 85 U.S. (18 Wall.) 57 (1873) 1, 5, 8, 12

Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839) 17

Wright v. Seymour, 69 Cal. 122, 10 P. 323 (1886) 10

STATUTES

Alaska Stat. 28.05.965(21) 15

Cal. Civ. Code § 670 (West 1982) 14

1715 N.C. Session Laws, ch. 6 22

1777 N.C. Session Laws, ch. 114, § 10 22

Submerged Lands Act of 1953 (43 U.S.C.A. §§ 1301-1315 (1982)) 19

43 U.S.C.A. § 1301(a) 20

43 U.S.C.A. § 1311(a) 20

43 U.S.C.A. § 1312 20

33 C.F.R. § 323.2 (July 1, 1986) 18

TEXTS

W. Burby, Handbook on the Law of Real Property, § 18 (3d ed. 1965) 8

TABLE OF AUTHORITIES—Continued

	Pages
4 R. Clark, Waters and Water Rights 105 (1970 ed.)	6
Comment, The Tideland Trust: Economic Currents in a Traditional Legal Doctrine, 21 U.C.L.A. L.Rev. 826 (1974)	16
J. Gould, Treatise on the Law of Waters, 100 (3d ed. 1900), citing *Commonwealth v. Vincent*, 108 Mass. 441 (1871)	6, 7, 8
3 J. Kent, Commentaries on American Law 413 (14th ed. 1896)	6
MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water, 3 Florida State U.L. Rev. 511 (1975)	6
G. Nash, The California State Land Office, 1858-1897, 27 Huntington Library Q. No. 4 (Aug. 1964)	24
M. Oxfield, Federal Land Grants To the States With Special Reference to Minnesota (unpublished paper, Univ. Minn. 1915)	17
Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L.Rev. 471 (1970)	25
H. Schultes, An Essay on Aquatic Rights 21 (1839 ed.)	7
Selvin, The Public Trust Doctrine in American Law and Economic Policy, 1789-1920, 1980 Wisc. L.Rev. 1403	8
Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U.C. Davis L.Rev. 195 (1980)	16
Wetlands: Their Use and Regulation, at 57-60 (U.S. Congress, Office of Technology Assessment, 1984)	27

TABLE OF AUTHORITIES—Continued

	Pages
CONSTITUTIONS	
Alaska Const., art. 8, § 6	14
Cal. Const., art. X, § 4	14
Wn. Const., art. 17, § 1	14

INTEREST OF AMICI

The interest of California and other states in this issue is clear. This Court has consistently held that the absolute property in and dominion and sovereignty over all soils under the tide water belongs to the states as an attribute of their sovereignty. (*Weber v. Board of Harbor Commissioners,* 85 U.S. (18 Wall.) 57, 65 (1873); accord, *United States v. Mission Rock Co.*, 189 U.S. 391 (1903).) This title passes not by grace of Congress, but by virtue of the United States Constitution. (*Oregon* ex rel. *State Land Board v. Corvallis Land & Gravel Co.*, 429 U.S. 363 (1977).) Although individual states fashioned their own rules accepting or renouncing these lands in whole or part, few of them gave up their tidal waters, whether or not they were navigable in fact. For tidelands are among the most important lands the state controls, and their disposition historically has been restricted both by common law and state constitutional limitations.

SUMMARY OF ARGUMENT

This case presents a novel and unprecedented challenge to state title to the beds of tidal waters. For nearly one hundred and fifty years this Court has consistently ruled that the individual states have complete title to the lands beneath tidal waters up to the line of mean high tide. Because there are thousands of miles of rivers and lakes in this country that are navigable in fact far above the flow of the tide, this Court has also extended the limits of state ownership to include the beds of freshwater

rivers and lakes that are navigable in fact. Petitioners now seek to reverse the direction of this juridical flow, arguing that state title to tidal waters should be limited to those which are also navigable in fact. There is no basis in precedent or policy for this new limitation. As a matter of federal constitutional law the equal footing doctrine, confirmed by Congress in the Submerged Lands Act, vests title to the beds of all tidally influenced *and* navigable waters in the individual states as an inherent aspect of state sovereignty. Accordingly, the decision below should be affirmed.

The doctrine of state sovereign ownership of submerged lands was developed by this Court from the common law of England. The common perception of American courts at that time was that under common law the crown held all tidal waters: because they were incapable of cultivation, because under concepts of civil law they were incapable of ordinary ownership, and because they constituted part of the seas over which the crown exercised admiralty power.

"Navigability" in English law, was a term of art based on whether waters were subject to tidal influence. Even in early times, however, some American courts recognized that the English definition of navigability was too restrictive; and that the same protections of public ownership should extend to the non-tidal rivers and lakes that constituted "common highways" for the new nation. This concept—that waters navigable in fact should be navigable in law—was adopted by this court in determining admiralty jurisdiction, in applying the commerce clause and, eventually, in determining the boundaries of sovereign ownership

under the equal footing doctrine. (*Barney v. Keokuk*, 94 U.S. 324, 337-338 (1876).)

Over a hundred years after these germinal decisions, this Court is now asked to decide whether, in extending the definition of navigability to non-tidal waters navigable in fact, it intended to repeal the old tidality test, or to merely supplement it. Neither the decisions of this Court nor the acts of Congress suggest an intent to effect such a repeal and to withdraw tidelands from the states—if indeed that is constitutionally possible.

Any other ruling would wreck havoc on established rules of property based upon the long-held and reasonable expectations of the states that title to the beds of tidally influenced waters vested in them at statehood. Nothing in the decisions of this Court respecting sovereign lands suggests that the extension of the doctrine of sovereign ownership to inland waters that are navigable in fact amounts to a repeal of the long-standing common law rule that all tidal waters were navigable in law. In the Submerged Lands Act, Congress unambiguously retained the distinction between tidal waters and lands beneath waters navigable in fact, and confirmed the states' title to both. Although individual states may adopt more restrictive rules of property, this Court has not. In California, as in other states, over a hundred years of litigation and legislation have brought about a painfully fashioned scheme of titles, depending on whether lands were tidal or non-tidal; navigable or non-navigable. It is too late in the day to unravel these legal skeins and introduce a new and novel limitation on the test of navigability for title.

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ARGUMENT

Nearly 150 years ago, Justice Catron described the issue now once again before this Court as "the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds . . . ." (*Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 235 (1845).) This is so because it has to do with basic principles of federalism: the relationship of state and federal sovereigns. In *Pollard's Lessee*, Justice Catron made essentially the same argument that petitioners have raised here. It was rejected by this Court in 1845, and one might well have assumed the point to have been settled.

The rule under which states claim their tidal waters is one basic to our constitutional system. It is based on the premise that "when the Revolution took place the people of each state became themselves sovereign" (*id.* at 410), and "all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States." (*Shively v. Bowlby*, 152 U.S. 1, 15 (1893).) Thus, "[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution of the United States, but were reserved to the states respectively." (*Pollard's Lessee v. Hagan, supra*, 44 U.S. (3 How.) 212, 230.) These interests, acquired by the original colonies and all subsequently admitted states, are consistently characterized as inherent attributes of sovereignty, "so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign . . . or transfer of sovereignty itself." (*U.S. v. Oregon*,

295 U.S. 1, 14 (1935).) Thus, since the tidal waters at issue here passed to the states as states, as part of their constitutional birthright, this Court will necessarily be cautious in holding that the subsequent extension of the definition of navigability acted to divest those interests from states that chose to retain them.

I

THE STATES ACQUIRED SOVEREIGN TITLE TO ALL LANDS UNDERLYING TIDEWATERS UPON THEIR ADMISSION INTO THE UNION

Every decision of this Court affirming the states' sovereign interest in tidal waters has done so without reference to navigability in fact. Otherwise, tidal flats and other lands whose sovereign nature was never questioned until now would be re-subjected to an entirely new test for title. The tidelands at issue in the basic holding of *Pollard's Lessee v. Hagan, supra,* 44 U.S. (3 How.) 212, were not only non-navigable in fact; they had been filled for years. (*Id.*, 3 How. at 220.)

The basic rule has often been restated:

> "Upon the admission of California into the Union upon equal footing with the original States, *absolute property in, and dominion and sovereignty over all soils under the tidewaters within her limits passed to the State,* with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General government." (*Weber v. Board of Harbor Commissioners, supra,* 85 U.S. (18 Wall.) at 65-66; emphasis added.)

Whether, under English common law, "navigability" was a term of art and actually dependent on the ebb and flow of the tide, or whether navigability in fact was the English test may be debatable (e.g., MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water, 3 Florida State U.L. Rev. 511 (1975); see also cases cited in Petitioner's Brief, pp. 17-23),[1] but in any event, the early American courts were justified in assuming, as they did,[2] that under the English common law, all waters subject to tidal influence were held by the crown in trust for the people.[3] Thus, as one com-

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1. It may be, as one authority suggests, that English common law embraced *two* legal fictions relating to navigability: Any tidal water was "navigable in law" for title determinations, whereas waters "navigable in fact" were subject to the public's right to navigate irrespective of ownership of their beds. (4 R. Clark, Waters and Water Rights 105 (1970 ed.); J. Gould, Treatise on the Law of Waters 100, 101 (3d ed. 1900), citing *Commonwealth v. Vincent*, 108 Mass. 441, 447 (1871).)

2. Chancellor Kent, one of the dominant commentators of the time, repeatedly emphasized this version of the rule, stating that "in the common-law sense of the term, those (rivers) only were deemed navigable in which the tide ebbed and flowed . . . ." (3 J. Kent, Commentaries on American Law 413 (14th ed. 1896).) "[A] right of fishery in *navigable or tide waters*, below high water mark, is a common right . . . ." (*Id.*, at 418 (emphasis added); see *Elwood v. City of New York*, 450 F.Supp. 846, 861 (1978): "[T]idal water was by definition 'navigable,' and fresh water 'non-navigable.'"

3. The common law rule under which the original colonies received their lands as successors to the Crown, and the equal footing doctrine under which states later admitted gained the same rights as an attribute of their sovereignty, are not to be confused with the public trust doctrine, under which each state fashions its own rules as to how these sovereign lands are to be administered. See *Appleby v. City of New York*, 271 U.S. 364 (1926); cf. Petition for Writ of Certiorari, pp. 11, 12, 15.) The question presented by this case is whether title to these lands passed to Mississippi and other states under the equal footing doctrine. Their subsequent status as trust lands must be determined under state law.

mentator wrote, the king, by common law, had title to the bed of the Thames "as high as the tide flowed," and a grant of the sovereign's interest to the City of London included "all the issues, breaches, creeks, and grounds overflown, as far as the water ebbeth and floweth . . . ." (H. Schultes, An Essay on Aquatic Rights 21, 22 (1839 ed.).) This assumption rested variously on the theory that in Great Britain rivers ceased being useful for navigability beyond the zone of tidal influence (*The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-455 (1851); that such rivers were considered to be a "branch of the sea," (H. Schultes, *supra*, at 50); that the King's admiralty jurisdiction extended to all tidal waters; and that lands covered entirely or periodically by salt water were incapable of cultivation or use. (E.g., *Shively v. Bowlby*, *supra*, 152 U.S. at 57; J. Gould, *supra*, at 39 n. 1.) As a result, navigability was determined by whether the lands in question were subject to tidal influence, and rivers were considered navigable to the extent of tidal flows. (H. Schultes, *supra*, at 50.)

But the rights and jurisdiction of states as sovereigns were not governed by "the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions." (*Pollard's Lessee v. Hagan*, *supra*, 44 U.S. (3 How.) at 229.) In the early nineteenth century, state courts showed an increasing realization that the rivers of the United States that were navigable in fact should be treated as sovereign waters irrespective of their tidality. (E.g., *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810) (Susquehanna River): "[S]ince the revolution, no part of the common law has been adopted except that which was proper for our country." (*Id.*, at 477.) (Accord, *Bullock v. Wilson*, 2 Port. 436 (Ala. 1835) (Coosa

River); *Collins v. Benbury,* 25 N.C. (3 Ired.) 277 (1842) (Albermarle and Pamlico Sounds); *Ingram v. Threadgill,* 14 N.C. (3 Dev.) 59 (1831) (Pedee River); and *Cates v. Wadlington,* 1 McCord 356 (S.C. 1822) (Enoree River).) Some states, however, retained the English common law rule and applied the tidal test. (See *Adams v. Pease,* 2 Conn. 481 (1818); *Middletown v. Pritchard,* 4 Ill. (3 Scam.) 519 (1842); *Commonwealth v. Chapin,* 22 Mass. (5 Pick.) 203 (1827); *Berry v. Carle,* 3 Me. (3 Green.) 269 (1825); *Scott v. Willson,* 3 N.H. 321 (1825); *Commissioners of the Canal Fund v. Kempshall,* 26 Wend. 404 (N.Y. 1841); *Gavitt v. Chambers,* 3 Ohio 495 (1828); and *Hayes v. Bowman,* 22 Va. (1 Rand.) 417 (1823).) (See generally, Selvin, The Public Trust Doctrine in American Law and Economic Policy, 1789-1920, 1980 Wisc. L.Rev. 1403, 1407, n. 10.)

What is important for these purposes is the perception American courts had of the law at the time the equal footing doctrine evolved. That perception was that the English test depended wholly on tidality. As Justice Field flatly stated in his "lodestone" Illinois Central decision, "In England the ebb and flow of the tide constitute the legal test of the navigability of waters." (*Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387, 435 (1892); see also, *Weber v. Harbor Commissioners, supra,* 85 U.S. (18 Wall.) at 65: "By (the common) law the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters is, in England, in the king, and, in this country, in the State." (Accord, *Barney v. Keokuk, supra,* 94 U.S. 324, 336; W. Burby, Handbook on the Law of Real Property, § 18, p. 45 (3d ed. 1965), citing Gould on Waters (3d ed.) § 42; *Shively v. Bowlby, supra,* 152 U.S. 1, 11:

"By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King."

In *Packer v. Bird*, 137 U.S. 661, 668-669 (1891), Justice Field quotes the Pennsylvania court's description of the common law rule with apparent approval:

> "We are aware that by the common law of England such streams as the Mississippi, the Missouri, the rivers Amazon and Platte, the Rhine, the Danube, the Po, the Nile, the Euphrates, the Ganges and the Indus, were not navigable rivers, but were the subject of private property, whilst an insignificant creek in a small island was elevated to the dignity of a public river, because it was so near the ocean that the tide ebbed and flowed up the whole of its petty course. The Roman law, which has pervaded Continental Europe, and which took its rise in a country where there was a tideless sea, recognized all rivers as navigable which were really so, and this common sense view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth." (*Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112, 120 (1863).)

Indeed, tidality was the common law test of navigability when this Court expanded the definition for admiralty purposes. (*The Propeller Genessee Chief v. Fitzhugh*, *supra*, 53 U.S. (12 How.) at 456-457.)

The American view of English common law was set forth clearly in *Shively v. Bowlby*, *supra*, 152 U.S. 1, 49: citing Justice Taney's classic opinion in *Martin v. Waddell*, 41 U.S. (16 Pet.) at 409-411 (1842) (emphasis added):

> "The title and dominion of the *tide waters* and of the soil under them, in each colony, passed by the royal charter to the grantees as 'a trust for the common use of the new community about to be estab-

> lished;' and, upon the American Revolution, vested absolutely in the people of each State 'for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' "

Or, as Justice Bradley put it in *Hardin v. Jordan,* 140 U.S. 371, 381 (1891): "The title to the shore and lands under tide water . . . 'is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation & fishery.' " (*Shively v. Bowley, supra,* 152 U.S. at 49.)

The title and dominion of the tidewaters and the lands under them are held by the United States for the benefit of the whole people, and, as this Court has often said, "in trust for the future States." (*Ibid.*)

Early state decisions applying the tidality test to determine title to waters which were not navigable in fact are common. In *Wright v. Seymour,* 69 Cal. 122, 10 P. 323 (1886), the California Supreme Court was confronted with a patent describing lands meandered along the Russian River. The river at the location in question was tidal but concededly not navigable in fact. Nevertheless the court held that under the common law test, the State owned its bed:

> "In the sense of the common law, Russian River, at the point indicated, is as completely a navigable stream as the Hudson at New York or the Thames at London." (*Id.,* at 124.)

Such lands under tidal waters belong to the state by virtue of its sovereignty, the court held. (*Id.,* at 126.) In *Murdock v. Stickney,* 62 Mass. (8 Cushing) 113, 115 (1851) the court held that a creek within the ebb and flow of the tide was navigable in "its technical sense" since all tidal waters are navigable under common law, and thus did not fall within a statute allowing construction of water mills

on non-navigable streams upon payment of an annual fee. The Connecticut court held that the tidal "flats" adjoining an arm of the sea were in public ownership. (*Simmons v. French*, 25 Conn. 346, 352 (1856).)

The American courts' concept of English common law was clear. As the Iowa court put it:

> "[T]he ebb and flow of the tide was, at common law, the most usual test of navigability, yet it was not necessarily the only one . . . But on the other hand, there are in England and in this country, many arms of the sea, which, though not navigable in fact, are so legally." (*McManus v. Carmichael*, 3 Iowa 1, 27 (1856).)

In characterizing the Mississippi River as navigable in the title sense, the court made it clear that the tests of tidality and navigability in fact were concurrent ones; that the later test did not displace the former one:

> "It is true that this legality (navigability) attaches to some waters that which do not possess the requisite quality in fact, but this arises from their relation to the high seas, and to admiralty, and to the difficulty of making a hundred exceptions." (*Id.*, at 30.)

Later opinions of this Court reinforce the conclusion that in extending the doctrine of "navigability" to include waters above the head of tide, the Court did not reject the settled doctrine that states have sovereign ownership of lands subject to the ebb and flow of the tides. For example, it is stated:

> "This *right of the States to regulate and control the shores of tide waters, and the land under them*, is the same as that which is exercised by the Crown in England. In this country the same rule *has been extended* to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi. . . ." (*Hardin v. Jor-*

dan, supra, 140 U.S. 371, 382, cited in *Shively v. Bowlby, supra,* at 46; emphasis added.)

In *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, the court cited *Weber v. Board of Harbor Commissioners, supra,* 85 U.S. (18 Wall.), 65-66, reaffirming the doctrine of *Pollard's Lessee:*

> " 'Upon the admission of California into the Union upon equal footing with the original States, *absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper,* subject only to the paramount right of navigation over the waters . . . .' [Emphasis in original]
>
> "In *Barney v. Keokuk,* 94 U.S. 324, 338 (1877), the Court *extended the doctrine to waters which were nontidal but nonetheless navigable,* consistent with its earlier extension of admiralty jurisdiction to such waters in *The Propeller Genesee Chief v. Fitzhugh,* 12 How. 443 (1852)." (*Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. at 374-375; emphasis added.)

A tidal water is navigable at law throughout its mudflats, inlets and estuaries. As the court observed with respect to the Sacramento River: " 'There is but one river, and that a navigable one. The waters on each side of the island constitute parts of one navigable stream.' " *Packer v. Bird,* 71 Cal. 134, 135, 11 P. 873 (1886), aff'd 137 U.S. 661 (1891).)[4]

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4. Indeed, counsel for the amicus American Land Title Association shared this undisputed assumption in an earlier proceeding, in which he stated:

"[M]y understanding is that for purposes of the *Pollard* rule, all tidal waters are treated as navigable and a determination of actual navigability is therefore not necessary as it would be with respect to lakes or other nontidal inland waters." (Argument of then Deputy Solicitor General Louis B. Claiborne, in *U.S. v. Alaska,* No. 84 Original, vol. XVII, transcript of oral argument on questions 6, 8, 9, 10 and 11 at p. 2433 (March 4, 1985).)

Petitioners' contentions that navigability in fact is now the exclusive test of sovereign ownership could, pursued to its logical extreme, drive state title in any navigable water below the mean high water mark to some undefined depth at which navigation could take place. Recognizing the problems inherent in this theory, amicus American Land Title Association has suggested that the court draw a distinction between the "shallow tidelands immediately bordering a navigable body of water" comprising the bed of the water, which amicus would concede to the state even though they are not themselves navigable in fact, and "discrete" wholly nonnavigable bodies of water, to which the states would have no claim even though they may be connected to navigable waters. (Brief of American Land Title Association at 5.) Not only are the authorities cited by this proposition inapplicable to the states' ownership of tidal waters, but the distinction suggested was rejected by this Court in *Mann v. Tacoma Land Co.* (1894) 153 U.S. 273. There, mudflats described by petitioners as subject to tidal ebb and flow "*presumably by the unnavigable waters of some bay or inlet of the waters of Puget Sound*" were held to be tidelands held by the State as sovereign. (*Id.* at 278, 283; emphasis added.) The *Mann* decision alone should be dispositive of this case.

Early state constitutions made similar assumptions. Thus, California's 1879 Constitution provides:

> "No individual, partnership, or corporation, claiming or possessing the frontage or *tidal lands* of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people

thereof." (Cal. Const., art. X, § 4 (formerly Cal. Const., art. XV, § 2; emphasis added.)

Only a few years later, the California Supreme Court described the tidelands, which could be granted only subject to the public trust, as including potentially "the entire sea beach from the Oregon line to Mexico and the shores of every bay, inlet, estuary, and navigable stream as far up as tide water goes and until it meets the lands made swampy by the overflow and seepage of fresh water streams." *People v. California Fish Co.*, 166 Cal. 576, 591, 138 P. 79, 85 (1913).) The California Civil Code, enacted in 1872, states: "The State is the owner of all land below tide water, and below ordinary high water mark, bordering upon tide water within the State; of all land below the water of a navigable lake or stream; . . ." (Cal. Civ. Code § 670 (West 1982).)

Washington's state constitution provides:

> "The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes. . . ." (Wn. Const., art. 17, § 1.)

Washington's Supreme Court has recently stated that this provision "was but a formal declaration by the people of rights which our new state possessed by virtue of its sovereignty" (citing *Robinson v. Silver Lake Ry. & Lumber Co.*, 153 Wash. 261, 274, 279 (P. 1109 (1929)), "which declaration had the effect of vesting title to such lands in the state. (Citation.)" (*Caminiti v. Boyle*, 107 Wash.2d 662, 666, 732 F.2d 989, 993 (1987).)

Alaska's state constitution similarly includes submerged and tidal lands within the "state public domain." (Alaska Const., art. 8, § 6.) "Tideland" is defined by

statute in that state as land which is periodically covered by tidal water between the elevation of mean high and mean low tides" without reference to navigability. (Alaska Stat. 38.05.965(21).)

And in *Jackvony v. Powel*, 67 R.I. 218, 21 A.2d 554, (1941), the Rhode Island court held that a provision of that state's 1843 Constitution guaranteeing to the people "all the rights of fishery, and the privileges of the shore, to which they have heretofore been entitled" gave them a right to pass along the foreshore between high and low tide lines. (*Id.*, at 222, 21 A.2d at 556.)

II

THE PROPERTY LAW OF THE STATES DEVELOPED IN RELIANCE ON THEIR CONTROL OF TIDAL WATERS. A CHANGE IN THE RULES OF LITTORAL OWNERSHIP WOULD CAUSE ENDLESS CONFUSION

Substantial and complex bodies of state property law have developed on the long-established assumption that the beds of tidal waters are sovereign lands. In *Shively v. Bowlby, supra,* 152 U.S. 1, this Court emphasized the principle controlling here: once admitted to the union, a state acquires title to all the lands beneath its navigable waters as an inherent attribute of sovereignty. "Whether, as rules of property, it would now be safe to change these doctrines (arising out of the confusion of the original classification of nontidal waters as non-navigable) where they have been applied . . . is for the several states themselves to determine." (*Barney v. Keokuk, supra,* 94 U.S. at 338, quoted in *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. at 379.) The states are free to adopt common law rules. They may decline jurisdiction over the beds of non-tidal waters, as does

New Jersey.[5] They may retain jurisdiction over waters both tidal and navigable in fact, or they may draw their boundaries at high water or low water.

Many states have made grants of their tidelands, and the nature and effect of the state patents again is construed under state law. Such a grant, depending on the jurisdiction, may constitute a complete fee. It may pass title subject to a retained public trust interest, it may pass revocable title, or it may be totally void. (See *Stevens*, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U.C. Davis L.Rev. 195, 214-220 (1980); Comment, The Tideland Trust: Economic Currents in a Traditional Legal Doctrine, 21 U.C.L.A. L.Rev. 826 (1974).)

Only one federal question properly exists: What was the nature of the lands that passed to the state by

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5. In *Cobb v. Davenport*, 32 N.J.L. (3 Vroom) 369, 379 (1867), the court, in considering the question of the title to the bed of a lake, said:

> "The tidal test, as distinguishing waters in which the property is in the sovereign, from those in which it is in private individuals, was said on the argument to be founded in no principle. Many of the rules of the common law, by which rights are ascertained and property is acquired, held, and transmitted, if subjected to such criticism would be found to be equally devoid of principle. As a rule by which individuals may be guided in ascertaining what rights belong to them, as a portion of the public, and what are exclusively within the domain of private ownership, it has the merit of uniformity and certainty, and is easy of application. The criterion suggested in the argument, of holding all rivers which are navigable in fact to be public rivers, and those which are not navigable in fact to be private rivers, is wanting in that accuracy and certainty at which the law aims. It can only be made certain by the addition of some arbitrary rule, such as depth of water, quantity of tonnage, or the like, and even then is still open to the objection that no man can tell whether he is exercising a public right, or trespassing upon a private right, without entering upon an investigation, and thus the way is open for discussion and disturbances."

virtue of its sovereignty? (*State Land Board v. Corvallis Sand & Gravel Co., supra*, 429 U.S. at 377; *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839).) The states represented herein have held and administered their tidelands and navigable nontidal waters under a complex of state and federal statutes and case law for well over a century. The public land system administered by the federal government recognized the existence of several classes of land, and dealt with them separately: the uplands, commonly referred to as the "public lands," were subject to entry and ownership under a variety of laws; the swamp and overflowed lands were subject to private ownership, and the beds of navigable waters and tidelands were held by states subject to a common law public trust. (See, e.g., M. Oxfield, Federal Land Grants To the States With Special Reference to Minnesota (unpublished paper, Univ. Minnesota 1915).)[6] The United States had no power to convey the tidelands and beds of navigable waters (*Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 17-19 (1935)), and even in the territories, as the court observed in 1876, "wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water." (*Barney v. Keokuk, supra*, 94 U.S. at 338.) To this day, the United

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6. Contrary to the implication raised by the amicus American Land Title Association, California is not claiming swamp and overflowed lands to which it is not entitled. Amicus' characterization of *California v. Southern Pacific Transportation Co.*, No. 277312 (Sacramento Superior Court 1985) is misleading in that respect. In that case both parties accepted the proposition that title was dependent on whether or not the property was tideland. The parties agreed that the State was vested with the lands in question on admission, if they were tidelands. And the State did not dispute the SP's legal title to the swamp and overflowed lands adjoining the tidelands. (Statement of Decision 3.) Finally, the State conceded that the tideland patents granted to SP were valid under California law, subject to a retained public trust interest. (*Ibid.*; see *People v. California Fish Co., supra*, 166 Cal. 576, 138 P. 79.)

States Bureau of Land Management declines to survey tidelands on the grounds they are not federal public domain lands. The Bureau's Manual of Surveying Instructions (Bureau of Land Management Tech. Bull. No. 6) states at page 4: "Tidelands which are covered by the normal daily overflow are not subject to survey as public land." Tidelands are defined in the Manual as follows:

> "Tidelands are coastal areas situated above mean low tide and below mean high tide, particularly as they are alternately uncovered and covered by the ebb and flow of the daily tides. As a part of the bed of navigable waters, such lands belong to the States. *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1844). Tidelands are mentioned here to stress their distinction from swamp and overflowed lands. Coastal 'salt marshes' that are covered by the daily tide are tidelands and not subject to survey. On the other hand, coastal marshes that are not covered by the daily tide are swamp and overflowed lands within the meaning of the grants and are subject to survey." (*Id.*, at 179.)

The Corps of Engineers has long operated under a definition of "navigable waters" based on either tidal ebb and flow or susceptibility for commerce, including "mudflats, sandflats, wetlands, (and) sloughs. . . ." (33 C.F.R. § 323.2 (July 1, 1986); see *United States v. DeFelice*, 641 F.2d 1169, 1175 (5th Cir. 1981): "Requiring tidal water bodies to meet the test for non-tidal, navigable in fact water bodies . . . is really to eliminate the ebb and flow test."

It is too late in the day to contend that the beds of tidal waters passed with upland grants in states that claimed them as sovereign lands. Land ownership in the states represented here is predicated on a settled system of law in which the effect of government patents is fully known and recognized. The effect of such grants depends on the nature of the lands granted. A patent to tidelands,

depending upon the applicable state law, may be invalid, may pass full title, or may pass title subject to a retained public trust interest. (E.g., *Ward v. Mulford*, 32 Cal. 365 (1867).)

Many titles have been adjudicated and settled on the premise that land bordering on tidewater, below the ordinary high water mark, belongs to the state. (E.g., *Ross v. Burkhard Investment Co.*, 90 Cal.App. 201, 207, 265 P. 982, 985 (1928).) This conclusion was warranted by this Court's consistent declarations that "grants of the government for lands bordering on tide water . . . only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which they are situated. . . ." (*Hardin v. Jordan, supra*, 140 U.S. at 381.)

III

THE STATES' TITLE TO TIDAL LANDS WAS CONFIRMED BY THE SUBMERGED LANDS ACT

Congress, which so consistently has dealt with tidelands differently than other types of lands, continued to recognize the difference in the Submerged Lands Act of 1953. (43 U.S.C.A. §§ 1301-1315 (1982). The genesis of this act was the submerged lands litigation, in which this Court declared that the federal government, and not the states, had "paramount right" in the three-mile marginal belt. (E.g., *United States v. California*, 332 U.S. 19, 38 (1947).)

Even there, the court noted:

> "The Government does not deny that under the Pollard rule . . . California has a qualified ownership of lands under inland navigable waters . . . and *even tidelands down to the low water mark.*" (*United*

States v. State of California, supra, 332 U.S. at 30; emphasis added.)

The submerged lands cases eventually led to enactment of the Submerged Lands Act, in which Congress relinquished paramount federal rights to the three-mile belt to the coastal states by:

(1) declaring the seaward boundary of coastal states to be three geographical miles seaward of their coastlines (43 U.S.C.A. § 1312);

(2) confirming to the states "title to and ownership of the *lands beneath navigable waters*" within their boundaries (43 U.S.C.A. § 1311(a); emphasis added); and

(3) Defining "lands beneath navigable waters" as follows:

> "(a) The term 'lands beneath navigable waters' means—
>
> "(1) all lands within the boundaries of each of the respective States which are covered by *nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union*, or acquired sovereignty over such lands and water thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;
>
> "(2) *all lands permanently or periodicallly covered by tidal waters up to but not above the line of mean high tide* and seaward to a line three geographical miles distant from the coast line of each such State . . . ." (43 U.S.C.A. § 1301(a); emphasis added.)

In *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), this Court stated:

> "[T]he [Submerged Lands] Act creates no new rights for the States in the beds of their inland waterways . . . Since the Act does not extend to the States any interest beyond those afforded by the equal-foot-

> ing doctrine, the State can no more base its claim to lands unnecessary to a navigational purpose on the Submerged Lands Act than on that doctrine." (*Id.*, at 324-325; emphasis added.)

The court reaffirmed its interpretation of the effect of the Submerged Lands Act in *California* ex rel. *Lands Comm'n. v. U.S.*, 457 U.S. 273, 283 (1982), stating: "The act . . . confirmed the title of the States to the tidelands up to the line of mean high tide." Thus, Congress has recognized that inland submerged and submersible lands "permanently or periodically covered by tidal waters up to . . . the line of mean high tide" are sovereign state lands, acquired at the time of statehood under the equal footing doctrine. This unambiguous language leaves no room for statements of legislative history offered in the amicus brief of American Land Title Association at 18, note 14.

Petitioner's theory, if adopted, would raise grave questions as to the authority of states to fashion their own rules of property, one of the principal attributes of sovereignty. As this Court observed, "Under our federal system, property ownership is not governed by a general federal law, but rather by the law of the several states . . . ." As Chief Justice Marshall said, "[I]n construing the statutes of a state on which land title depends, infinite mischief would ensue should this court observe a different rule from that which has long been established in the state. . . ." (*McKeen v. Delancy's Lessee*, 9 U.S. (5 Cranch) 22, 32 (1809).) This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), an exception was carved out on the local law of real property. (*Id.*, at 18.) (*State Land*

Board v. Corvallis Sand & Gravel Co., supra, 429 U.S. at 378, 379.)

A new rule excluding lands beneath tidal waters from state sovereign title would wreak havoc on established state rules of property and effectively rescind the rules first set down by this Court in *Martin v. Waddell* and *Shively v. Bowlby.* Not only would those states in which such lands are held be deprived of them; but the status of titles conferred by tideland patents covering such lands would be thrown into disarray.

A new, uniform federal rule could replace state rules of property such as Hawaii's, under which the state holds the seashore to the line of vegetation. (*Application of Ashford,* 50 Haw. 314, 316-317, 440 P.2d 76, 78 (1968)); or that of Texas, where the state, under civil law principles, holds to a higher high tide, as distinguished from the mean high tide of the common law, for lands granted before Texas adopted the common law in 1840 (*Luttes v. State,* 159 Texas 500, 537, 324 S.W.2d 167, 191 (Tex. 1958)), or that of North Carolina, which has prohibited the grant or private entry of lands subject to the "ebb and flow of the sea; then as high as salt water is found, so high the tide, the flow of water from the sea, ascends." (*Collins v. Benbury (II)*, 27 N.C. 118, 126 (1884); 1777 N.C. Session Laws, ch. 114, § 10; 1715 N.C. Session Laws, ch. 6.) It could extinguish state rules under which public trust rights to dry sand areas have been held to exist (*Matthews v. Bay Head Improvement Assn.,* 95 N.J. 306, 326, 471 A.2d 355, 364 (1984), cert. den. 469 U.S. 821); or where, under a statute over 300 years old, the upland owner holds to low tide within a hundred rod limit. (*Commonwealth v. Alger,* 61 Mass. (7 Cush.) 53, 67 (1851).)

And it could change the law of Texas, under which the state holds title to the beds of streams at least 30 feet wide. (*State v. Bradford*, 50 S.W.2d 1065 (Tex. 1932).)

Historically, grants with the purpose of divesting the sovereign of its interests, held on behalf of the people, have been viewed by federal and state courts alike with disfavor. (*Illinois Central Railroad v. Illinois*, 146 U.S. 387, 453-454 (1892); *Shively v. Bowlby*, *supra*, 152 U.S. at 10, 13; *People v. California Fish Co.*, *supra*, 166 Cal. at 592, 138 P. at 86.) Thus, in *Martin v. Waddell*, *supra*, 41 U.S. (16 Pet.) 414, the court said:

> "[I]t would require very plain language . . . to persuade us that the public and common right of fishing in navigable waters which has been so long and so carefully guarded in England . . . was intended, in this one instance, to be taken away."

Or as the California court put it:

> "It is not to be assumed that the state, which is bound by the public trust to protect and preserve this public easement and use, should have intentionally abdicated the trust as to all land not within the very limited areas of the reservations, and should have directed the sale of any and every other part of the land along the shores and beaches to exclusive private use, to the destruction of the paramount public easement, which it was its duty to protect, and for the protection and regulation of which it received its title to such lands." (*People v. California Fish Co.*, *supra*, 166 Cal. at 591, 138 P. at 85.)

The contentions of petitioner and its amici lead into a quagmire from which there is no ready egress. Rather than providing certainty, their adoption would lead to a new series of land grabs, renewing the hopes of a multitude of claimants holding deeds to tidelands surveyed and patented in good or bad faith in the "gilded age" of

the nineteenth century. (See, e.g., G. Nash, The California State Land Office, 1858-1897, 27 Huntington Library of No. 4 (Aug. 1964); *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 504, 476 P.2d 423, 455, 91 Cal.Rptr. 23, 55 (1970).)

Traditionally, each state has had a choice as to whether to claim all of the tidal lands within its jurisdiction, or to adopt a different boundary. Each state has been free to deal with its tidelands "according to its own views of justice and policy . . . ." (*Shively v. Bowlby, supra*, 152 U.S. at 26.)

IV

PUBLIC TRUST INTERESTS PROVIDING THE BASIS FOR SOVEREIGN OWNERSHIP APPLY TO ALL TIDAL WATERS

California and other states share an interest in the beds of tidal waters acquired as an inherent attribute of sovereignty. These lands are held in public trust for the people of the states: for the historic purposes of commerce, fishery and ecological preservation. These trust purposes go far beyond those of historic navigability in fact. In earliest times, the trust existed not only for commerce, but for fishery as well. In fact the initial controversies leading to enunciation of the public trust doctrine in this country were based on the right to utilize oyster beds, not channels of commerce. (*Arnold v. Mundy*, 6 N.J.L. (1 Hal.) 1 (1821);[7] *Martin v. Waddell*, *supra*,

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7. *Arnold v. Mundy*, *supra*, 6 N.J.L. 1, revolved around an oyster bed in the mouth of the Raritan River, on land "about fifty yards below common low water mark (over which the tide ebbed and flows); and . . . frequently bare at the full and change of the moon, and commonly, though not always so, in the fall and spring . . . and . . . the space between it and the shore is what they call a mud flat, commonly covered with water, but not a channel for vessels or other craft usually plying in the river." (*Id.*, at 66.)

41 U.S. (16 Pet.) 367.) Today the value of oyster beds—and the more extended values of nonnavigable tidal waters—are well known. They constitute breeding grounds and a source of food for innumerable species. They act as filters, protecting adjacent water from pollution. Their function as part of the sea is undeniable. (Cf. *Just v. Marinette County*, 56 Wis.2d 7, 16-17, 201 N.W.2d 761, 768 (1972).)

These are lands early decisions characterized as being common to all the people "for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of water and its products (a few things excepted) . . . ." (*Arnold v. Mundy, supra*, 6 N.J.L. at 77; see also *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158 (Mass. 1863), construing the right of fishing and fowling in great ponds.)

Today, the public trust is described in similar terms:

> "The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs . . . the state is not burdened with an outmoded classification favoring one mode of utilization over another . . . There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is preservation of these lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenary and climate of the area." (*Marks v. Whitney*, 6 Cal.3d 251, 259-260, 491 P.2d 374, 98 Cal.Rptr. 790 (1971); accord, *Borough of Neptune City v. Avon by the Sea*, 61 N.J. 296, 294 A.2d 47 (1972).)[8]

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8. Of course the extent and nature of the public trust remains a question of state law, to be determined by the individual states just as much as those states are free to determine their own rules of property. (See generally, Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L.Rev. 471 (1970) and cases cited therein.

As population pressures have grown, scientific studies have shown increasingly the value of shrinking estuarine areas as sources of food, cover, nesting and spawning areas for fish, shellfish, waterfowl and animals. It is the sovereign's trust duty "to protect the people's common heritage of streams, lakes, marshlands and tidelands. . . ." (*National Audubon Society v. Los Angeles Dept. of Water and Power,* 33 Cal.3d 419, 441, 658 P.2d 709, 724, 189 Cal. Rptr. 346, 361 (1983), cert. den. 464 U.S. 977 (1983).)

As the Oregon court stated:

> "Because the trust is for the public benefit, the state's trustee obligation is commonly described as the protection of specified public usages, e.g., navigation, fishery and, in more recent cases, recreation. The severe restriction upon the power of the State as trustee to modify water resources is predicated not only upon the importance of the public use of such waters and lands but upon the exhaustible and irreplaceable nature of the resources and its fundamental importance to our society and to our environment. These resources, after all, can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee." (*Morse v. Oregon Div. of State Lands,* 34 Or. App. 853, 581 P.2d 520, 524 (1978), aff'd., 285 Or. 197, 590 P.2d 709 (1979) [permit to fill 32 acres of estuary for airport runway found inconsistent with the public trust].)

Massachusetts has taken a similar position. In holding that lands in the Boston waterfront were impressed with the public trust coincidental with state sovereign ownership, the federal court stated:

> "For centuries, land below the low water mark has been recognized as having a peculiar nature, sub-

ject to varying degrees of public demand for rights of navigation, passage, portage, commerce, fishing, recreation, conservation and aesthetics." (*United States v. 1.58 Acres of Land*, 523 F.Supp. 120, 122 (D. Mass. 1981).)

This formulation, the court states:

> "[R]ecognizes the division of sovereignty between the state and federal governments—those aspects of the public interest in the tideland and the land below the low water mark that relate to commerce and other powers delegated to the federal government are administered by Congress in its capacity as trustee of the jus publicum (fn), while those aspects of the public interest in this property that relate to non-preempted subjects reserved to local regulation by the states are administered by state legislatures in their capacity as co-trustee of the jus publicum." (*Id.*, at 123.)

Tidelands are vital to the existence of the estuarine fish and shellfish which pass their lives in estuaries or else require estuaries as nursery grounds. Fish and shellfish may feed directly upon plant material washed into the estuary in the form of detritus, or they may feed upon smaller invertebrates that use the plant material and detritus as a major food source. (*Wetlands: Their Use and Regulation*, at 57-60 (U.S. Congress, Office of Technology Assessment, 1984).)

In addition to providing food for estuarine and freshwater fisheries, these lands protect the fisheries by maintaining water quality. As water flows through them, pollutants such as phosphates and nitrates are filtered. Toxic substances are trapped by adsorption to tidal soils. (*Wetlands: Their Use and Regulation, supra* at 48-50.)

The old English courts justified the crown's interest in tidal waters on the basis that they were part of the sea. We are becoming more aware daily that the tidal waters

are essential parts of the sea; for the propagation of wildlife, and to cleanse polluted waters. The wisdom of the eighteenth century public trust duty to hold these waters for "fisheries" as well as commerce, becomes increasingly apparent as scientific knowledge grows.

CONCLUSION

Faced with such a consistent and strong judicial tradition of construing grants of sovereign land against the grantee, it is daring indeed to suggest that judicial decisions extending the common law of navigability to nontidal waters had the effect of limiting application of the equal footing doctrine to waters navigable in fact. And if they did, would they have retroactive effect? Would tidal waters be vested in the original 13 colonies, as they were in the Crown, but not in states admitted later, after the more expansive doctrine developed? The "navigability in fact" doctrine appears to have emerged no earlier than 1810, at best, in *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810) and its first application under the admiralty clause occurred in 1851. (*The Propeller Genessee Chief v. Fitzhugh, supra*, 53 U.S. (12 How.) at 457.) This Court first recognized applicability of the "navigability in fact" test to titles received under the equal footing doctrine in *Barney v. Keokuk, supra*, 94 U.S. 324. If the tidal navigability rule has been superseded by one or more of these decisions, would such a supersession be applied with total retroactivity to all the states, or only to states admitted after any one of those significant jurisdictional dates?

Petitioner here has raised an unprecedented attack on an established rule of property; one involving the lands

the states acquired as an inherent attribute of their sovereignty. To change the rules at this date would shake state property systems to their very foundations. Neither history nor reason dictate such a result.

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